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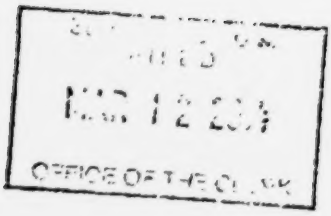

No. 13-356

In the
# Supreme Court of the United States

CONESTOGA WOOD SPECIALTIES CORP., et al.,
*Petitioners,*

v.

KATHLEEN SEBELIUS, et al.,
*Respondents.*

*On Writ of Certiorari to the*
*United States Court of Appeals for the Third Circuit*

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## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Conestoga Wood Specialties Corp., a Pennsylvania business corporation that does not have parent companies and is not publicly held, and its family owners, Norman and Elizabeth Hahn, and their three sons, Norman Lemar, Anthony, and Kevin Hahn, who are individual persons.

Respondents are the Departments of Health and Human Services, Treasury, and Labor, and the Secretaries thereof, Kathleen Sebelius, Jacob Lew, and Thomas Perez, respectively, sued in their official capacities. During the litigation below, the Secretaries of the Treasury and Labor Departments were replaced by Mr. Lew and Mr. Perez, respectively.

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## INTRODUCTION

The Affordable Care Act asserts "unprecedented" power over individual liberty. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2647–48 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting); *id.* at 2589 (opinion by Roberts, C.J.) (emphasizing "'the lack of historical precedent'" (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010))).

Here, the government hopes this lack of precedent will work in its favor. Although the government has in recent years promoted birth control, until now it had understood that abortion and contraception were too personal and fraught with religious significance to coerce one citizen into paying for those items for another. Having taken that unprecedented step in the Mandate being challenged here—and having itself accommodated the religious beliefs of some—the government cannot deny or claim surprise that its actions implicate religious liberty concerns of the first order.

The government attempts to avoid having to justify those burdens on religious exercise by denying that businesses and their owners exercise religion, but here too the government's position is unprecedented. Before this litigation no court had declared either profit-making activity or the corporate form, or even the combination of the two, incompatible with religious exercise. There is no basis for this Court to immunize the government from satisfying the applicable level of scrutiny to justify its burden on religious exercise.

When it does attempt to offer a compelling interest for its coercion, the government contends that Petitioners harm the "freedom" of third parties simply by not buying them abortifacients. Resp. Br. 23. But that turns ordinary notions of liberty upside down. Citizens are already free to buy birth control for themselves and the government often subsidizes those purchases. Yet in the government's view that is not enough. For the government, coercion is the new "freedom."

Less restrictive alternatives to the Mandate abound. The availability and subsidization of birth control are just two of "many ways other than this unprecedented ... Mandate by which the regulatory scheme's goals ... could be achieved" without coercing the Hahns and Conestoga. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2647 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

But the government's problems in justifying the Mandate's substantial burdens on religious exercise are far more fundamental. The Mandate cannot satisfy any meaningful scrutiny because it is not only riddled with exceptions and accommodations, but Congress itself did not consider the Mandate to be an interest "of the highest order." Congress was content to leave birth control out of the preventative services Mandate altogether, leaving that question to regulators who in turn deferred to a quasi-governmental group. Moreover, Respondents admit that Congress allowed the creation of "comprehensive" religious exemptions to the Mandate, which by definition could have included the Hahns and Conestoga. And while Congress

treated certain requirements as so compelling that even grandfathered plans must comply with them, the preventative services Mandate did not make that cut. The net result is a Mandate perforated with inapplicable circumstances—some based on accommodating religious exercise and some due to the Mandate's low priority within the administrative scheme.

The Mandate, in short, is the opposite of the universal and neutral rule upheld in *United States v. Lee*, 455 U.S. 252 (1982). This haphazard requirement cannot survive strict scrutiny, which is why the government is so eager to avoid it.

## ARGUMENT

### I. Business Owners and Their Companies Can Exercise Religion at Work.

Despite protestations to the contrary, the government certainly does contend that "people of faith must check their religious convictions at the door when they enter the commercial arena." Resp. Br. 1. "Pluralism," in the government's view, *id.* at 12, does not leave room for American businesses owned and run by religious families that object to assisting the destruction of human life.

The government imposes its religious exercise whitewash by insisting that neither families who closely own and operate their businesses, nor their business entities themselves, can object when the government forces them to violate their religious principles. Yet the government cannot cite a single authority to support that exclusion either in this

Court's decisions, in state corporate enabling statutes, or in RFRA.

Instead, prior to this litigation there was a consensus that families can exercise religion in a business without regard to whether they incorporate, and the government's foreclosure of that exercise is a substantial burden. That does not mean that religious exercise claims always prevail. But it does mean that the government does not automatically win whenever it visits religious burdens on incorporated family businesses.

### A. The Hahns Exercise Religion When They Run Their Business, and the Mandate's Prohibition of That Religious Exercise Is a Substantial Burden.

The government asserts that when it coerces a religious family's closely held business to violate their beliefs, the family's religious exercise is somehow not implicated. But this view inherently burdens those whose religious beliefs demand that their behavior reflect their principles in all spheres of life. It effectively forces citizens to compartmentalize their faith from their daily activities. And it contradicts the daily experience of religious people who commonly follow their principles when they earn a living in business.

The Hahns are a Mennonite family from Lancaster County, Pennsylvania. They hail from a religious tradition known for incorporating faith into every aspect of life, including business. *See* Pet. App. 11g. This faith perspective towards business activity

is shared by many belief systems.[1]

In *Lee*, this Court established that legal impositions on businesses implicate the free exercise rights of owners charged with carrying out those requirements. 455 U.S. at 256–57; *see also Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Consistent with that common-sense recognition, and until this litigation, courts had little difficulty holding that families running closely-held business corporations likewise exercise religion therein. *See, e.g., EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619–20 (9th Cir. 1988); *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985); *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210 (2d Cir. 2012).

The government is thus in no position to boast that precedent is on its side. All of these commonsense precedents would need to be discarded to accept the government's view. By contrast, recognizing that both the Hahns and their closely-held corporation may exercise religion is faithful to precedent and the plain text of RFRA and the Dictionary Act.

Lacking precedential support, the government relies on a parade of horribles concerning laws that it supposes would be impacted by religious exercise

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[1] *See, e.g.*, Resp. Br. 27, *Sebelius v. Hobby Lobby Stores, Inc.*, (No. 13-354) (Feb. 10, 2014) ("Hobby Lobby Br."); C12 Group, LLC Amicus Br. 23–31; Council for Christian Colls. & Univs. Amicus Br. 11–13; Protestant Theologians Amicus Br. 20–23; The Nat'l Jewish Comm'n on Law & Pub. Affairs Amicus Br. 6–17; U.S. Conference of Catholic Bishops Amicus Br. 11–15.

in business. But that argument conflates the issue of whether religious exercise exists with the separate question of whether a religious claimant wins. Most regulations face no religious objection, and when they do, if RFRA applies, claimants must show a substantial burden and the government has the opportunity to justify the burden under the compelling interest test. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436–37 (2006) (vindicating the present claimants while recognizing that others had not succeeded).

To be sure, the government's efforts to justify this exception-riddled Mandate are doomed under strict scrutiny. But that has everything to do with the nature of the Mandate and does not suggest that all business religious exercise claims will succeed. Many government regulations burden individuals, yet in RFRA's twenty-year existence the sky has not fallen.

The government relies heavily on the generic corporate law principle that business owners are distinct from their corporations. But this is irrelevant as to whether a regulation substantially burdens family owners' exercise of religion in their business, for three illustrative reasons.

First, the government's view is nonsensical under Pennsylvania law where Conestoga is incorporated. "A person is legally accountable for any conduct he performs or causes to be performed in the name of a corporation ...." 18 Pa. Cons. Stat. § 307(e)(1). And "[w]henever a duty to act is imposed by law upon a corporation," the corporation's responsible agent may be "legally accountable ... to the same extent as if

the duty were imposed by law directly upon himself." *Id.* § 307(e)(2). Thus, contrary to the government's insistence, the Mandate is a burden on the Hahns.

Second, the legal principle of limited liability for shareholders does not encompass the question of whether religion is being exercised in business. Forcing Conestoga to provide abortifacient coverage necessarily coerces the Hahns to implement the Mandate within Conestoga in violation of their own religious exercise. Avoiding this coercion would require the Hahns to subject their family livelihood and their property to massive fines, or to cease owning a business altogether. All of these options are egregious burdens on their religious exercise.

Third, the government is glad to treat the Hahns and similar close-holding owners as indistinct from their corporations when they file their taxes under subchapter S. "There is no good answer" to explain why the tax code coolly "disregards" the corporate form in this way, but RFRA should be interpreted as silently refusing to do so. *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1225 (D.C. Cir. 2013) (Randolph, J., concurring).

Both law and morality show that corporate owners and officers do not merely pursue profit, but have personal, legal, and religious responsibility for what they do in business.[2] Even the government

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[2] *See, e.g.*, Loulla-Mae Eleftheriou-Smith, "Apple's Tim Cook: Business isn't just about making profit," *The Independent* (Mar. 2, 2014), *available at* http://www.independent.co.uk/life-style/gadgets-and-tech/news/apples-tim-cook-business-isnt-just-about-making-a-profit-9163931.html (last visited Mar. 9, 2014).

sometimes acknowledges this principle.[3] Its tactical refusal to do so here is based on a desire to avoid subjecting its ill-founded Mandate to strict scrutiny. The Court should decline this novel invitation to exclude religious liberty from families in business.

### B. Closely Held Family Businesses Exercise Religion under RFRA and the First Amendment.

Corporations are not devoid of religious mission simply because they operate for profit. Respondents suggest that this kind of dual corporate purpose is unseemly, at least as a matter of free exercise. But they flounder for a coherent principle on which to ground their rule.

The texts of RFRA and the First Amendment allow for no such arbitrary limitation. The government's policy concerns regarding corporate governance, the free market, and religious entanglement are already addressed by well-established corporate law principles.

#### 1. Corporations Are Persons Under RFRA and Free Exercise Case Law.

The Dictionary Act governs RFRA's protection of religious exercise in 42 U.S.C. § 2000bb-1(a) and provides that "unless the context indicates

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[3] See Statement by the President (Feb. 5, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/02/05/statement-president (last visited Mar. 9, 2014) ("I applaud this morning's news that CVS Caremark has decided to stop selling cigarettes and other tobacco products in its stores ....").

otherwise" the word "person" "include[s] corporations ... as well as individuals." 1 U.S.C. § 1; *see also Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1707 (2012) (recognizing that Congress often uses "individual" instead of "person" to "distinguish between a natural person and a corporation").

The government therefore has the burden of proving the "context indicates otherwise" with respect to for-profit corporations. Yet it evades this burden. RFRA's context contains no such indication. On the contrary, RFRA protects "any" exercise of religion. 42 U.S.C. 2000cc-5(7)(A); *id.* § 2000bb-2(4). This universal language was inserted in the wake of a congressional debate in which all sides agreed that RFRA encompassed claims by business corporations. *See* Christian Legal Soc'y Amicus Br. 31–32.

Fleeing the statute, the government seeks contrary "context" by pointing out that no case from this Court has held that for-profit corporations are persons under RFRA. But no case has said they are not. Moreover, several cases say religious exercise happens in business (*Lee*, *Braunfeld*), and lower courts say it happens in business corporations (*Townley*, *McClure*, *Commack*). Religious exercise is not purely personal (because non-profit corporations exercise religion). And *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), says to look at the First Amendment activity being exercised, not at the plaintiff's corporate status.

Therefore, nothing in RFRA's context "indicates other[]" than that it protects any religious exercise by corporations. Existing precedent and context

confirm that Petitioners exercise religion here.[4]

### 2. Because For-Profit Corporations Can Hold and Act on Beliefs, They Should Not Be Categorically Excluded From Religious Exercise.

There is no principled basis on which to rule that for-profit corporations by nature cannot exercise religion, while non-profits can. The scope of the First Amendment and RFRA (and the Dictionary Act, for that matter) cannot and do not turn on mere distinctions in the tax code.

For-profit corporations are not prohibited by state law from exercising religion, nor are they constrained to pursue profit only. JA 27–41. On the contrary, they can and do pursue a wide variety of interests. *See* Twenty States Amicus Br. 17–18. Conestoga's corporate mission includes profit, but it also seeks to honor God. *See* Pet. App. 10g–11g; *see also* Council for Christian Colls. & Univs. Amicus Br. 9 (naming various for-profit companies and their

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[4] The government also suggests that since Congress created explicitly narrower religious exemptions in earlier statutes, such as the Civil Rights Act, it must have intended the same narrowness in RFRA's unequivocally broad language. That not only violates basic canons of statutory construction, but it ignores that related statutes support the existence of corporate religious identity. The Fourth Circuit, for instance, recently joined other circuits in concluding that a for-profit corporation is a "person" under Title VI and the Dictionary Act, and can be imputed with its owners' minority status to raise racial discrimination claims. *See Carnell Const. Corp. v. Danville Redev. & Hous. Auth.*, Nos. 13-1143, 13-1229, & 13-1239, 2014 WL 868620, at *5–6 & n.4 (4th Cir. Mar. 6, 2014).

religiously-motivated actions, such as "closing on Sunday," "producing and selling kosher foods," "offering financial products that are consistent with Islamic teachings about usury," and "employing chaplains to provide spiritual counsel to employees").

"The government to date has not offered any citation supporting the proposition that religion is so alien to the marketplace that it never can be exercised in commercial pursuits." Twenty States Amicus Br. 16. Instead, those engaged in various for-profit endeavors have brought religious liberty claims before this Court. *See* Hobby Lobby Br. 19–21 (discussing *Lee*, *Braunfeld*, and *Gallagher v. Crown Kosher Super Market, Inc.*, 366 U.S. 617 (1961)). Nor is religious corporate activity new. The Nation's very first corporations, like the Virginia Company, were engaged in both the "propagat[ion] of Christian Religion" and profitable activities, such as digging "Mines of Gold, Silver, and Copper." Christian Booksellers Ass'n Amicus Br. 14–15.

This Court has never suggested that a commercial enterprise lacks religious liberty because of its profit motive. Conestoga, a subchapter S corporation, should not be deprived of rights simply because it can earn profit. If neither corporate status nor profit motive forfeit religious liberty, those two aspects together do not do so either.

### 3. Corporate Governance and the Market are Already Adapted for Religious Exercise.

The government proposes a parade of corporate

horribles, contentious proxy battles, and impending religious claims by publicly traded entities such as IBM or GE. Resp. Br. 30. Such concerns are unrealistic. Large corporations are already faced with choices over whether to pursue social justice, civil rights, and environmental concerns, and with disputes over the interests of majority shareholders, proxy questions, and the like. Corporate law has extensive mechanisms in place for dealing with these scenarios.[5] Religion as one motive among many does not change the landscape.

In fact, religion is already part of that landscape, since state law allows corporations to pursue it among all lawful purposes. There are no practical or theoretical grounds for specifically excluding religion as a permissible basis for corporate decision-making—indeed, it would be a clear violation of the First Amendment to even try. *See Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (noting that the government cannot ban "acts or abstentions only when they are engaged in for religious reasons"). Yet businesses infrequently choose to pursue religious ends.

As a practical matter, it is hard to demonstrate any interest shown by large, publicly-traded corporations in exercising religion. Market forces tend to push such firms far away from religious controversy. It is no accident that this case and

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[5] *See* Stephen M. Bainbridge, *A Critique of the Corporate Law Professors' Amicus Brief in* Hobby Lobby *and* Conestoga Wood, 17–24, UCLA School of Law, Law-Econ Research Paper No. 14-03 (Feb. 21, 2014) *available at* http://ssrn.com/abstract=2399638 (last visited Mar. 9, 2014).

related litigation involve corporations that are closely held. *See* Pet. App. 11–41. Religion is most able to be both exercised and factually demonstrated in a closely-held company with religious owners who possess a unity of ownership and control over corporate decisions and motives.

The government suggests that the availability of religious exemptions might give some companies a competitive advantage. *See* Resp. Br. 31–32. This is a strange assertion in a case where the government contends that providing birth control coverage is *cheaper* than not doing so. But the reason markets are free and competitive is that customers and employees can make decisions based on a company's values as well as based on its prices. Diversity of values in the market is desirable for owners and consumers alike. The government would instead homogenize the market to conform to its choice among the many competing religious values related to health care.

**4. Recognizing Corporate Religious Liberty Does Not Conflict with the Establishment Clause.**

The government and its *amici* in varying degrees raise Establishment Clause concerns, all of which are exaggerated. Notably, the government did not raise below the prospect that Conestoga's RFRA claim might violate the Establishment Clause, *see* Appellees' Br. 14–41, *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (2013) (No. 13-1144), 2013 WL 1752562 (3d Cir. filed Apr. 15, 2013) ("Gov't Appellees' Br."), so that claim is waived,

*Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

Moreover, that argument is quite odd in light of the government's successful defense of the Religious Land Use and Institutionalized Persons Act, RFRA's sister statute, in *Cutter v. Wilkinson*, 544 U.S. 709 (2005). *See* Constitutional Law Scholars Amicus Br. 5–18 (explaining RFRA's consistency with this Court's Establishment Clause precedent). There is nothing uniquely problematic about religious accommodations for corporations.

## II. The Government Has Not Established a Compelling Interest.

The government has the burden of justifying its coercion by showing that refusing an exemption to the "particular claimant" is the least restrictive means of serving a compelling interest. *O Centro*, 546 U.S. at 430–31. And the government's interest must be substantially compelling in itself, not merely by virtue of some claimed benefit to third parties. *See id.* at 429–30, 436.

### A. The Government Begs the Question, and Improperly Attempts to Avoid its Burden, by Asserting a Compelling Interest Against Third-Party "Harm."

The government studiously attempts to avoid demonstrating a specific compelling interest. Instead, the government proposes that because its coercion would deliver coverage to third parties, that alone satisfies strict scrutiny. Resp. Br. 39–40. But laws do not serve compelling interests simply

because they compel.

Nearly all religious accommodations could be said to affect third parties somehow. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963), upheld an exemption for employees from working on the Sabbath on religious grounds, even though the exemption imposed a cost on an identifiable third party, the employer. In *Wisconsin v. Yoder*, 406 U.S. 205, 229–31 (1972), this Court also rejected the argument that a religious exemption was unavailable because it would burden "the substantive right of the Amish child to a" state-provided education. And mathematically speaking, conscientious objectors to war cause other citizens to be subject to the draft. *See also* Constitutional Law Scholars Amicus Br. 12–18.

Likewise, this Court has often deemed laws restricting freedom as failing constitutional scrutiny despite identifying some harm to third parties. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 529–30 (1993), the Court required a religious exemption despite harm identified to the public health, cruelty to animals, and emotional harm to children. It did the same in *O Centro*, 546 U.S. at 426, despite the assertion of harm if the drug was diverted to third parties instead of being used for sacramental purposes.

Speech that is "upsetting or arouses contempt" need not fail constitutional scrutiny. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2010). Even speech defaming third parties receives significant constitutional protection. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964). And freedom of the

press can be protected even amidst threats to national security and therefore to third-party safety. *N.Y. Times Co. v. United States*, 403 U.S. 713, 718–19 (1971). This Court has steadfastly declined to take speech outside the Constitution's protection simply because of "societal costs." *United States v. Stevens*, 559 U.S. 460, 470 (2010) (quotation omitted). When the compelling interest test applies, third-party interests are not, and should not be, given more weight against religious exercise than against other constitutional freedoms.

To assume that third party "harm" actually exists here gives the government too much credit. The government cannot impose an unprecedented burden on Petitioners to pay for third parties' birth control and then object that a free exercise claim automatically and compellingly burdens those third parties. Such a rule would allow burdens on religious exercise to escape any meaningful scrutiny even when—without precedent—they require furnishing abortifacient items to others. Petitioners simply ask not to be forced to deliver such items to other people. This mere freedom from government coercion does not constitute "harm" to third parties, unless the government shows that they possess a baseline entitlement—apart from the bare existence of the Mandate—to coerce Conestoga to supply abortifacients to them.

The government fails to identify such a grave baseline interest. Constitutional privacy rights are no help, nor do anti-discrimination laws establish such an entitlement. *See* Pet. Br. 49–51.

Not even the Patient Protection and Affordable Care Act ("ACA") deems the delivery of cost-free abortifacients to be so important that if it did not exist, it could be said that recipients are gravely or even significantly "harmed." Congress did not consider employer-provided, cost-free birth control sufficiently "compelling" to directly require its provision in 42 U.S.C. § 300gg-13(a)(4), or to ensure that it would be provided in grandfathered plans, *id.* § 18011. Congress instead left the definition of "preventative services" to an agency, and left tens of millions of women in grandfathered plans without the Mandate's contraception-coverage guarantee. Congress thus treated its interest in providing preventive services as objectively inferior among other ACA concerns, giving grandfathered plans an immutable "right" to withhold that coverage. *Id.* § 18011. It is not possible to say a RFRA exemption to the Mandate causes objective harm when the ACA gives so many plans a "right" to cause such harm.

Congress also left the ACA fully subject to RFRA. *Id.* § 2000bb-3. Moreover, Respondents concede that Congress allowed them to create "comprehensive" religious exemptions to the Mandate.[6] 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). But while RFRA extends to all persons, including corporations, the Executive Branch created its own regulatory web of exemptions and accommodations, which provide

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[6] To the extent Respondents deny that their Mandate exemptions were required under RFRA, that too is a backhanded concession against the Mandate's compelling interest. No rule can implicate an interest "of the highest order" if Congress framed that rule to allow for exemptions that are gratuitous.

protection only to a subset of "persons" entitled to free exercise protection under RFRA.

This undermines the government's case in two respects. First, the Executive's own felt need to make exemptions and accommodations pursuant to express regulatory authority, *see id.*, belies its present effort to deny that the Mandate imposes a substantial burden on religious exercise. Second, RFRA simply does not allow an agency to create regulatory exemptions for a subset of persons entitled to free exercise protection. RFRA applies to the ACA, and RFRA provides the answer to who, at a minimum, is entitled to an exemption—namely, all persons whose religious exercise is substantially burdened. Respondents' efforts to carve out a subset of "religious corporations" is flatly inconsistent with RFRA.

The government ultimately proposes that any time it compels a religious believer to act for a third party, it has a compelling interest in ensuring the third party gets the forced service. This reasoning is entirely circular. The government must *demonstrate* compelling interests, not assume them. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738–39 (2011). If the government compelled a religious pacifist business to buy its employees firearms, or a Catholic hospital to perform late term abortions, the mere fact that the coercion is said to benefit a third party would not prove a compelling interest.

Finally, lost in the government's analysis is the undeniable fact that refusing to grant a RFRA exemption also causes harm—a harm federal law

expressly seeks to avoid. RFRA and the First Amendment place great inherent weight on the harm caused to religious people who are coerced by the federal government to cease a sincere religious exercise. If third-party harm were a trump card against exemptions, it would mean that the harm to religious exercise would always be deemed acceptable, no matter how insignificant the government's interest or how many alternative means of serving it are available.

### B. The ACA and the Mandate Are Neither Comprehensive, Nor is "Comprehensiveness" a Compelling Interest Raised Here.

The government appears to add a new, previously unraised compelling interest in its brief: "comprehensiveness" in implementation of the ACA. Resp. Br. 39. The government waived this distinct interest by not raising it below. *See* Gov't Appellees' Br. 36; *Sprietsma*, 537 U.S. at 56 n.4.

For the government to invoke an interest in comprehensiveness when it comes to a Mandate riddled with exceptions borders on the farcical. That proposition cannot be sustained either with respect to the Mandate in particular or the ACA in general.

Comprehensiveness in regulatory implementtation and preserving employees' ability to enforce the Mandate, *see* Resp. Br. 39, cannot be a compelling interest apart from an underlying substantive interest of the highest order. Otherwise, the government could insist it has a compelling interest in comprehensiveness every time someone

invokes RFRA. In *O Centro*, this Court lightly mocked such an interest: "The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions ...." 546 U.S. at 436.

But even if comprehensiveness for its own sake could be a compelling interest, it would be a complete misfit with the Mandate. The Mandate's structure does not require comprehensiveness. To the contrary, as discussed above: Respondents concede that Congress allowed "comprehensive" religious carve-outs to the Mandate, the ACA is subject to RFRA, Congress itself exempted tens of millions of women in grandfathered plans from the Mandate, and Congress did not even say that birth control needed to be included in the Mandate. Respondents cannot call compelling what Congress deemed optional.

The government also seems to argue that it has a compelling interest, not in women getting abortifacient coverage, but in them getting it *from their employer*. This moves the goalposts of the government's interests away from "health" and "equality" and instead to the mere source of the items. But birth control works the same no matter who pays for it and any inconvenience of using, for example, a government-issued, contraception-insurance card in addition to one's employer-health-plan card, cannot be called a grave harm. The ACA undermines any interest in employer-provided

insurance by its creation of health insurance exchanges and expansion of Medicaid. The government has also done nothing to provide birth control coverage to the tens of millions of women that the government itself "harmed" when it left them in grandfathered health plans indefinitely.

Finally, the government's insistence on avoiding gaps in a system of comprehensive coverage rings hollow in light of the administration's remarkable implementation of a statute in which effective dates are unilaterally waived and entire classes of employers (for example, those with between 50-100 employees) are temporarily exempted from providing mandatory coverage, repeatedly in conflict with the ACA's clear statutory text.[7]

The Mandate is therefore the polar opposite of a regime "uniformly applicable to all, except as Congress provides explicitly otherwise." *Lee*, 455 U.S. at 261. Neither the government's newly-discovered (and waived) interest, nor its hopelessly generic preserved ones, can convert this regime into a paragon of uniformity.

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[7] *See* U.S. Senators Cruz, et al., Amicus Br. 4–12; Robert Pear, "Consumers Allowed to Keep Health Plans for Two More Years," N.Y. TIMES (Mar. 5, 2014), *available at* http://www.nytimes.com/2014/03/06/us/politics/obama-extends-renewal-period-for-noncompliant-insurance-policies.html (last visited Mar. 9, 2014); Robert Pear, "Further Delays for Employers in Health Law," N.Y. TIMES (Feb. 10, 2014), *available at* http://www.nytimes.com/2014/02/11/us/politics/health-insurance-enforcement-delayed-again-for-some-employers.html (last visited Mar. 9, 2014).

## III. The Government Has Less Restrictive Means of Furthering Its Goals.

The Mandate also fails the least restrictive means test. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). A party need not endure an ongoing violation of free exercise rights simply because the government chooses not to implement another alternative. Instead, RFRA assigns the government the burden of demonstrating the absence of less restrictive means to achieve its goals. *See* 42 U.S.C. § 2000bb–1(b).

"There are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty." *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013); *see also* Pet. Br. 63–65; Hobby Lobby Br. 57–58. The government cannot assume that a "plausible, less restrictive alternative would be ineffective." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 824 (2000).

Nor can Respondents hide behind their supposed lack of existing statutory authority to expand contraception subsidy programs to serve their interests. Resp. Br. 55–56. The question of least restrictive means is not whether Respondents presently have the power to pursue them, but whether the government at large could do so, especially by building on programs it already funds.[8] *See Playboy*, 529 U.S. at 824 (recognizing that a less restrictive means is available even if Congress has

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[8] *See* JA 42–43 (listing federal statutes that provide funding for family planning); Women Speak for Themselves Amicus Br. at 17–18 (same).

not yet started the process of "giving careful consideration" to alternatives or enacting any changes). Indeed, the lack of present statutory authority to pursue Respondents' interests suggests that they are not compelling in the first place. That inadequacy is hardly surprising given Congress' indifference as to birth control's inclusion in the Mandate and its decision not to apply the Mandate to tens of millions of women.

Ultimately, offering a religious exemption serves the government's interests. Respondents admit that Congress allowed for "comprehensive" exemptions to the Mandate in addition to leaving it subject to RFRA. The government has chosen to exempt and accommodate many religiously objecting employers, and it chose to neither impose the Mandate nor provide alternative coverage to tens of millions of women in grandfathered plans. Unlike *Lee*, 455 U.S. at 259–60, where Congress deemed universal employer participation necessary for Social Security to function, no such universality exists or was deemed necessary by Congress here. *See Korte*, 735 F.3d at 686 ("Since the government grants so many exceptions already, it can hardly argue against exempting these plaintiffs.").

## IV. Petitioners Need Not Show Religious Animus to Prevail Under the Free Exercise Clause.

Citing a lack of evidence of religious animus in enacting the Mandate, the government attempts to sweep Petitioners' First Amendment claim under the rug. But it is an "untenable" and "remarkable view"

that an injury under the Free Exercise Clause requires religious animus. *Cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

"Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment," and "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983); *see also Lukumi*, 508 U.S. at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.").

A majority of Justices in *Lukumi* made that clear. Justice Scalia, joined by Chief Justice Rehnquist, emphasized that the "First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted ...." *Lukumi*, 508 U.S. at 558. Thus, as Justices Blackmun and O'Connor explained, the Free Exercise Clause's protection extends "beyond those rare occasions on which the government explicitly targets religion ... for disfavored treatment, as [was] done in [the *Lukumi*] case." *Id.* at 577–78.

Pure motives, as Justice Souter noted, are not enough: "A law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids." *Id.* at 561. This case, quite simply, involves the latter. In

sum, although religious animus may be sufficient to violate the Free Exercise Clause, it is not required. *See Shrum v. City of Coweta*, 449 F.3d 1132, 1144 (10th Cir. 2006) (listing cases in which this Court and others have applied the Free Exercise Clause to foreclose the application of laws enacted "not out of hostility or prejudice, but for secular reasons").

Lower courts have long recognized that the prerequisite of discriminatory intent that applies in the equal protection context has no place in the free exercise realm. *See, e.g., Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234 n.16 (11th Cir. 2004) ("Under *Lukumi*, it is unnecessary to identify an invidious intent in enacting a law ...."); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 168 n.30 (3d Cir. 2002) (noting that both *Lukumi* and *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.), focused on "the objective effects of the selective exemptions at issue without examining the responsible officials' motives"); *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1292 n.3 (7th Cir. 1996) (explaining that "[t]he subjective motivations of government actors should ... not be confused with what the Supreme Court ... referred to, in [*Lukumi*], as the 'object' of a law").

That is presumably why the government fails to cite a single case holding that the Free Exercise Clause is toothless unless a law's object is "to infringe upon or restrict practices because of their religious motivation." Resp. Br. 15, 17 (quotations omitted). Such an approach would not only shield "oft-disguised" antipathy, *Rappa v. New Castle*

*Cnty.*, 18 F.3d 1043, 1062 (3d Cir. 1994), but also allow the government to "favor religions that are traditional, that are comfortable, or whose mores are compatible with the State, so long as it does not act out of overt hostility to the others. That is plainly not what the framers of the First Amendment had in mind." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008).

## CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

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